(3)

No. 99-1852

Supreme Court, U.S.
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CLERK

IN THE
Supreme Court of the United States

ROBERT B. SKLAROFF, M.D.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
By D. MICHAEL FISHER, in his OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Pennsylvania Supreme Court

BRIEF FOR RESPONDENTS PHILIP MORRIS INCORPORATED, BROWN & WILLIAMSON TOBACCO CORPORATION (INDIVIDUALLY AND AS SUCCESSOR BY MERGER TO THE AMERICAN TOBACCO COMPANY, INC.), R.J. REYNOLDS TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, UNITED STATES TOBACCO COMPANY, THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., THE TOBACCO INSTITUTE, INC. AND HILL & KNOWLTON, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether this Court lacks jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where all of the Pennsylvania state courts' decisions rested on "adequate and independent" state law principles.

2. Whether this Court lacks jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner has failed to satisfy the criteria for standing under Article III of the United States Constitution.

3. Whether this Court lacks jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner has failed to preserve a federal issue in the Pennsylvania state courts, and failed to raise a federal issue in the petition.

4. Whether the petition presents any issue worthy of review by this Court.

LIST OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENTS

The named parties to the proceeding in the Supreme Court of Pennsylvania included:

Robert B. Sklaroff (Appellant/Petitioner for Intervention)

The Commonwealth of Pennsylvania, by D. Michael Fisher, in his official capacity as Attorney General of the Commonwealth of Pennsylvania (Appellee/Plaintiff)

Philip Morris Incorporated; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; B.A.T. Industries, p.l.c.; The American Tobacco Company, Inc., c/o Brown & Williamson Tobacco Corporation; Lorillard Tobacco Company; Liggett Group Inc.; United States Tobacco Company; The Tobacco Institute, Inc.; The Council for Tobacco Research-U.S.A., Inc.; Smokeless Tobacco Council, Inc.; and Hill & Knowlton, Inc. (Respondents/Defendants)

The following Respondent companies are joining in this opposition:

Philip Morris Incorporated
Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company, Inc.)
R.J. Reynolds Tobacco Company
Lorillard Tobacco Company
United States Tobacco Company
The Council for Tobacco Research-U.S.A., Inc.

The Tobacco Institute, Inc.
Hill & Knowlton, Inc.

Pursuant to Rule 29.6 of the Supreme Court Rules, the following statements identify the corporate parents and all publicly held companies owning ten (10) percent or more of the voting stock of each corporate Respondent:

Respondent Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Respondent Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company, Inc.) has the following parent corporations:

B.A.T. Industries, p.l.c.
BATIC Inc.
BATUS Holdings Inc. UK/US
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Limited
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc.
(formerly known as RJR Nabisco, Inc.)

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Lorillard Tobacco Company has the following parent corporations:

Lorillard, Inc.
Loews Corporation

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public.

Respondent United States Tobacco Company has the following parent corporation:

UST Inc.

UST Inc. is the only publicly held company that owns 10% or more of United States Tobacco Company's stock.

Respondent The Council for Tobacco Research-U.S.A., Inc. ("CTR") has no parent corporations. There are no publicly held companies that own 10% or more of CTR's stock.

Respondent The Tobacco Institute, Inc. has no parent corporations. There are no publicly held companies that own 10% or more of The Tobacco Institute, Inc.'s stock.

Respondent Hill & Knowlton, Inc. has the following parent corporations:

WPP Group Holdings Corp.
WPP Group USA, Inc.
WPP Group International Holdings, Inc.
WPPIH Two, Inc.
WPP Luxembuorg S.ARL
WPP Group plc
Ogilvy Group Inc.
J. Walter Thompson Company

WPP Group plc is the only publicly held company that owns 10% or more of Hill & Knowlton, Inc.'s stock.

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COUNTER-STATEMENT OF THE CASE

Respondents Philip Morris Incorporated, Brown & Williamson Tobacco Corporation (individually and as successor by merger to the American Tobacco Company, Inc.), R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, United States Tobacco Company, The Council for Tobacco Research-U.S.A., Inc., The Tobacco Institute, Inc., and Hill & Knowlton, Inc. (collectively, "Respondents") oppose the frivolous petition of Dr. Robert B. Sklaroff ("Sklaroff") to this Court for a writ of certiorari to the Supreme Court of Pennsylvania. This petition is part of Sklaroff's continuing assault on the historic settlement agreement between various manufacturers of tobacco products ("tobacco manufacturers") and the attorneys general of 46 states, the District of Columbia, and five U.S. territories. Courts in all 52 jurisdictions have approved this agreement, and 49 jurisdictions—including the Commonwealth of Pennsylvania (the "Commonwealth")—have already begun receiving payments from the tobacco manufacturers. Nonetheless, despite having been told repeatedly by the Pennsylvania courts that he has no standing to bring such an action, Sklaroff continues to challenge this agreement, wasting substantial time and resources of the Commonwealth and Respondents. This Court should end Sklaroff's effort to disrupt the national settlement agreement and deny his petition on the grounds that: (1) the Pennsylvania courts' decisions were based on adequate and independent state grounds; (2) Sklaroff lacks standing; (3) no federal issue is properly presented for review by this Court; and (4) Sklaroff's petition raises no issue worthy of this Court's review.

A. The Master Settlement Agreement between the State Attorneys General and the Tobacco Manufacturers

On April 23, 1997, the Attorney General of the Commonwealth filed a lawsuit in the Court of Common Pleas of

Philadelphia County against a number of tobacco manufacturers[1] seeking damages, recovery of Medicaid and other medical payments and injunctive relief. *See Commonwealth of Pennsylvania v. Philip Morris, Inc.*, No. 2443 (Philadelphia County Ct. C.P. April 23, 1997). The Commonwealth's lawsuit was one of a series of lawsuits filed by other states, the District of Columbia and several U.S. territories. Shortly after the filing of these cases, the various plaintiffs and tobacco manufacturers entered comprehensive settlement negotiations. These negotiations concluded on November 23, 1998, when 46 states, including the Commonwealth, the District of Columbia and five U.S. territories, agreed to the Nationwide Master Settlement Agreement (the "MSA").

Pursuant to the MSA, the tobacco manufacturers agreed to pay the Commonwealth of Pennsylvania $11.26 billion over the next 25 years, and an additional $500 million per year in perpetuity thereafter. The tobacco manufacturers also agreed to numerous restrictions that otherwise could not have been imposed by court order. The Commonwealth has already begun receiving payments from the tobacco manufacturers under the MSA.

B. The Pennsylvania Court of Common Pleas' Rejection of Sklaroff's Petition to Intervene

On December 11, 1998, the Commonwealth and the tobacco manufacturers filed Joint Motions with the Court of Common Pleas to approve the settlement agreements and dismiss the lawsuit. However, before the trial court could rule on the motions,

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[1] Specifically, the Commonwealth sued the following parties: Philip Morris Incorporated; R. J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; B.A.T. Industries, p.l.c., The American Tobacco Company, Inc.; Lorillard Tobacco Company; Liggett Group, Inc.; United States Tobacco Company; The Tobacco Institute Inc.; The Council for Tobacco Research-USA, Inc.; Smokeless Tobacco Council, Inc.; and Hill & Knowlton, Inc.

a number of anti-tobacco organizations and individuals, including Sklaroff (collectively, the "Activists"), together with a group of not-for-profit hospitals and the County of Allegheny, Pennsylvania, petitioned to intervene in the Commonwealth's case. The Activists, although not opposing the negotiation or conclusion of the MSA, challenged the MSA's release and offset provisions, which the petitioners asserted might impair their right to bring legal actions against the tobacco manufacturers in the future. At the time of the intervention petitions, the Activists had not instituted any suit against the tobacco manufacturers.

Ultimately, on January 13, 1999, after considering all of the arguments and the relevant Pennsylvania laws governing standing to intervene and ripeness, Judge John W. Herron of the Court of Common Pleas of Philadelphia County, Pennsylvania, entered orders approving the MSA and denying all the petitions to intervene (with the exception of the petition of a particular health care maintenance organization, which was denied later). The court concluded that the proposed intervenors failed to satisfy the criteria for intervention set forth in Pennsylvania Rules of Civil Procedure 2326 through 2329.[2]

Specifically, the court dismissed the Activists' challenge to the release provision of the MSA pursuant to the Pennsylvania Supreme Court's opinion in *Pennsylvania Crime Commission Subpoena*, 309 A.2d 401 (Pa. 1973). In that case, the Pennsylvania Supreme Court denied certain police officers' petitions to intervene and challenge the subpoenaing of disciplinary records maintained by the Police Commissioner for the City of Philadelphia because the officers' only interest was the possibility that the subpoenaed information could be used against them in a future action. *Pennsylvania Crime Commission Subpoena*, 309

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[2] Pennsylvania Rule of Civil Procedure 2327 provides that intervention should be permitted if: "(4) the determination of such action may affect any enforceable interest of such person whether or not he may be bound by a judgment in the action." Pa.R.C.P. 2327.

A.2d at 405. In rejecting the Activists' petition to intervene, the Court of Common Pleas found that the Activists' challenge to the MSA's release provision, like the petitions to intervene in *Pennsylvania Crime Commission Subpoena*, raised "anticipatory concerns about the effect of a third party's action (*i.e.*, the MSA) on a future action that [the intervention petitioners] might bring." C.P. Op., Appendix A to Petition at 31. Because the effect of the MSA provision "if any . . . [could not] be determined except in the context of that future [action the Activists might bring]," the court concluded that the Activists' challenge to the release provision failed to present "an actual case or controversy – a legally enforceable interest – ripe for disposition." *Id.* Accordingly, the Activists' challenge to the release provision failed to satisfy Pennsylvania Rule of Civil Procedure 2327.

Similarly, the Court of Common Pleas concluded that the Activists lacked standing to intervene and standing to challenge the MSA's indemnity provision. The court found that the Activists failed to satisfy the Pennsylvania Supreme Court's standing requirements set forth in *Sierra Club v. Hartman*, 605 A.2d 309 (Pa. 1992), which requires:

> [g]enerally, in order to have standing, a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens. To surpass that common interest, the interests must be substantial, direct, and immediate.

Sierra Club, 605 A.2d at 310. In particular, the court concluded that the Activists "failed to establish either direct or immediate harm" caused by the indemnification provision of the MSA. C.P. Op., Appendix A to Petition at 37. Accordingly, the petitions were denied.

C. The Pennsylvania Appellate Courts' Rejection of Sklaroff's Appeals

While most of the Activists appealed to the Pennsylvania Commonwealth Court, all of the Activists subsequently with-

drew their appeals prior to the Commonwealth Court's decision – except Sklaroff. *See* Opinions of the Commonwealth Court, attached as Appendix B to Petition. On August 10, 1999, the Commonwealth Court issued an opinion, *en banc*, with one dissent, affirming the decision of the Court of Common Pleas, and holding that Sklaroff failed to satisfy the standing requirement for intervention under Pennsylvania law. Specifically, the Commonwealth Court held that Sklaroff sought "to represent the public interest common to all citizens," and that such interest was "insufficient to confer standing" to intervene under the Pennsylvania Supreme Court's holding in *Sierra Club v. Hartman*, *supra*. *See* Appendix B to Petition at 63-64. The Commonwealth Court's opinion did not address any federal issues.

Undeterred, Sklaroff petitioned the Supreme Court of Pennsylvania for review of the Commonwealth Court's opinion. In his request for review, Sklaroff argued that the lower courts had failed to apply Pennsylvania state law properly. The Pennsylvania Supreme Court summarily dismissed Sklaroff's petition on December 20, 1999. Sklaroff has now petitioned this Court for the issuance of a writ of certiorari to the Pennsylvania Supreme Court.

D. Sklaroff's Petition to this Court

In his petition, Sklaroff raises several meritless and irrelevant arguments premised almost exclusively on interpretations of Pennsylvania state law. First, Sklaroff asserts that he is entitled, pursuant to Pennsylvania law, to intervene and challenge the adoption of the MSA as a "citizen, taxpayer, father, activist, physician, private [attorney general] and litigant." Petition at 17. Second, Sklaroff asserts that his subsequent lawsuit against Philip Morris Incorporated, which is completely separate from this case and is not a part of the record here, should give Sklaroff standing. Petition at 23-24. And finally, Sklaroff argues that granting his petition would yield the "required judicial review" of the MSA. Petition at 24-30. None of these grounds justifies issuing a writ of certiorari in this case.

SUMMARY OF ARGUMENTS

This Court should not grant a writ of certiorari in this matter for the following reasons. First, the Pennsylvania courts' decisions that are the subject of Sklaroff's petition turned on adequate and independent state grounds. Second, Sklaroff still has not alleged the requisite standing to bring this petition under Article III of the United States Constitution. Third, Sklaroff's petition does not raise a federal issue that has been properly preserved for review by this Court. Finally, Sklaroff's petition raises no issue worthy of this Court's review. Accordingly, this Court should deny the petition.

REASONS FOR DENYING THE WRIT

I. ALL ISSUES RAISED BY SKLAROFF WERE DECIDED ON ADEQUATE AND INDEPENDENT STATE GROUNDS, AND ARE THEREFORE NOT SUBJECT TO THIS COURT'S JURISDICTION

This Court lacks jurisdiction to issue a writ of certiorari in this case because the Pennsylvania courts' orders denying Sklaroff standing to intervene were based on adequate and independent state grounds. From the time of its formation, this Court has adhered to the principle that "it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *see also Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("in the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional"). As explained by the *Pitcairn* Court, "[this Court's] only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Id.*, 324 U.S. at 125-126. Consequently, this Court will review opinions of a state court only when the "state court decision fairly appears to rest primarily on federal law, or [appears] to be interwoven with the federal law, and when the adequacy and independence of any possible state

law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

The Pennsylvania courts denied Sklaroff's petition to intervene on adequate and independent state grounds. As stated above, the Court of Common Pleas dismissed Sklaroff's petition because he failed to satisfy the standard for intervention under Pennsylvania Rule of Civil Procedure 2327 and otherwise lacked standing under the Pennsylvania Supreme Court's opinions in *Pennsylvania Crime Commission Subpoena* and *Sierra Club*. *See* C.P. Op., Appendix A to Petition at 31-37. The Commonwealth Court, in affirming the opinion of the Court of Common Pleas *en banc*, with one dissent, agreed that Sklaroff lacked standing to intervene under the standard set forth in the *Sierra Club* opinion. *See* Appendix B to Petition at 62-63. Finally, upon consideration of the above record, the Pennsylvania Supreme Court, in a summary order, denied Sklaroff's petition for review of the Commonwealth Court's order and allowed the lower courts' application of Pennsylvania law to stand. Appendix C to Petition.

These decisions by the Pennsylvania state courts did not implicate federal law. The Pennsylvania courts applied the Pennsylvania Rules of Civil Procedure, which are clearly distinct from the federal rules. Furthermore, it is well recognized that Pennsylvania state law standing requirements are independent of federal standing jurisprudence. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("the state courts are not bound to adhere to federal standing requirements"). Accordingly, the state courts' opinions were based on adequate and independent state grounds, and this Court has no jurisdiction to review such opinions.

II. SKLAROFF DOES NOT HAVE STANDING TO OBTAIN REVIEW BY THIS COURT

Sklaroff's petition fails to establish that he has standing to challenge the MSA and consequently fails to present this Court with a "case or controversy" upon which jurisdiction may rest. At an irreducible minimum, Article III of the United States Constitution requires the party who invokes a federal court's authority to "show that he personally has suffered some actual or threatened injury." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). This "injury in fact" must be "concrete and particularized and actual or imminent, not conjecture or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury must also be "fairly . . . traced to the challenged action" and "likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). These criteria ensure that the "legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., et al.*, 454 U.S. 464, 472 (1982).

In applying these Article III standing criteria, this Court has adhered to the basic principle that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Valley Forge Christian College*, 454 U.S. at 474. "This Court has repeatedly rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law . . .'" *Id.*, 454 U.S. at 482 (*quoting Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

It is plain from the record before this Court that Sklaroff has no standing to prosecute his petition. Sklaroff fails to assert any actual, concrete injury caused by either the MSA or the inability

to intervene in the Commonwealth's lawsuit against the tobacco manufacturers. Instead, Sklaroff asserts only that "[he] has an interest in the outcome of the suit that surpasses the common interest of all citizens *in procuring obedience to the law*, but which is asserted in the present/future interest." Petition at 17 (emphasis added). This interest in "procuring obedience to the law" is exactly the type of claim that this Court has repeatedly rejected – a claim which amounts to "little more than [an] attempt[] 'to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government.'" *Flast v. Cohen*, 392 U.S. 83, 106 (1968). Like the public interest group that this Court held to have no standing in *Valley Forge Christian College*, Sklaroff has asserted no injury other than "the psychological consequence . . . [of] observation of conduct with which one disagrees." *See Valley Forge Christian College*, 454 U.S. at 485. Accordingly, this Court should deny Sklaroff's petition for certiorari, as Sklaroff has failed to demonstrate that he has standing under Article III of the United States Constitution.

III. SKLAROFF'S PETITION FAILS TO RAISE A FEDERAL ISSUE

This Court should not issue a writ of certiorari because a federal issue is not properly before this Court. This Court is specifically empowered to review only "final judgments or decrees rendered by the highest court of a State . . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. § 1257. Except in "very rare circumstances," this Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C.

§ 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (dismissing writ of certiorari where petitioner, although raising certain due process arguments before the Alabama Supreme Court, failed to raise the due process challenge contained in the petition). "When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (*citing Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3 (1983)).

According to the record presented in the petition, Sklaroff did not properly present a federal issue to the Pennsylvania state courts. The Pennsylvania courts failed to pass on any federal issue, and dismissed Sklaroff's intervention petition on state law grounds. Moreover, Sklaroff's petition fails to demonstrate that a federal issue was nonetheless properly raised in the courts below, as is his burden. In fact, Sklaroff's petition to this Court centers almost exclusively on the state law principles applied by the lower courts. *See* Petition at 15, 17-21. While Sklaroff poses the conclusory and unsupported assertion that "[b]locking Dr. Sklaroff and the Activists from intervening denies them due process (under the 1st, 5th and 14th Amendments) and equal protection (under the 14th Amendment and the PA Constitution's Declarations of Rights)," Petition at 23, he fails to explain how any of these federal constitutional provisions are implicated by the state courts' rulings, or whether the issues were even preserved in the state courts.[3] Accordingly, as Sklaroff has failed

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[3] In fact, in the very next sentence of his petition, Sklaroff elaborates only on the provisions of the Declaration of Rights in the Pennsylvania Constitution and provides no discussion of the federal constitutional provisions.

to raise a federal issue in his petition, or to allege that a federal issue was preserved in the state courts below, this Court should not issue a writ of certiorari under 28 U.S.C. § 1257.

IV. SKLAROFF'S PETITION DOES NOT RAISE AN ISSUE WORTHY OF REVIEW BY THIS COURT

Finally, in addition to its constitutional and statutory deficiencies, Sklaroff's petition fails to raise any issue of substance worthy of this Court's review. Certainly, none of the reasons for review set forth in Rule 10 of the Rules of the Supreme Court apply to his petition. *See* Sup. Ct. R. 10. Accordingly, this Court should deny Sklaroff's petition.

CONCLUSION

For all of the foregoing reasons, this Court should deny Sklaroff's petition.

Respectfully submitted,

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